THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release **June 23, 1995**

STATEMENT BY THE PRESIDENT

I oppose efforts in the Congress to institute a new guestworker or "bracero" program that seeks to bring thousands of foreign workers into the United States to provide temporary farm labor.

In its most recent report, the bipartisan Commission on Immigration Reform chaired by Barbara Jordan unanimously concluded that a large-scale guestworker program would be a "grievous mistake." We have worked hard to reduce illegal immigration and have made great progress toward controlling this longstanding and serious problem. To allow so-called temporary workers to cross the border now would undermine all the success we have achieved.

A new guestworker program is unwarranted for several reasons:

* It would increase illegal immigration
* It would reduce work opportunities for U.S. citizens and other legal residents
* It would depress wages and work standards for American workers

When these programs were tried in the past, many temporary guestworkers stayed permanently--and illegally--in this country. Hundreds of thousands of immigrants now residing in the U.S. first came as temporary workers, and their presence became a magnet for other illegal immigrants.

If our crackdown on illegal immigration contributes to labor shortages -- especially for perishable crops that require large numbers of workers for short periods of time -- I will direct the Departments of Labor and Agriculture to work cooperatively to improve and enhance existing programs to meet the labor requirements of our vital agricultural industry consistent with our obligations to American workers.

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Talking Points
H-2A Agricultural Guest Workers -- Wyden-Graham Legislation

Background.

- Farm workers are among the poorest and most vulnerable in our society. Average annual earnings of farm worker families are only about $6,500 and farm workers are employed on average only about 26 weeks per year.

Current Program.

- The H-2A "guest worker" program admits temporary nonimmigrant agricultural workers in order to provide farmers with an adequate supply of laborers during the growing season. There is no cap on the number of H-2A visas granted annually.

- Currently there are 1.6 million farm workers in the U.S. of which approximately 600,000 are illegal (unauthorized to work), 1 million are legal (citizens or authorized foreign labor), and 20,000 are in the H-2A program.

- Under the current program, in order to hire H-2A workers, an employer must demonstrate to the DOL that:

  (a) there are not sufficient U.S. workers able, willing, qualified and available to perform the services; and,

  (b) there will be no adverse effect on the wages and working conditions of similarly-employed U.S. workers.

- Employers also are required to:

  --pay workers an "adverse effect wage rate" (AEWR), determined by the average wage paid to non-managerial agricultural workers in the state;

  --provide free housing to workers coming from outside the commuting area;

  --reimburse workers' inbound transportation if they complete half the contract, outbound also if they complete the contract; and,

  --guarantee 3/4 of the hours of the contract; and,

  --hire any qualified U.S. worker who applies during the first half of the work contract.

State of Play.

- The H-2A program has been heavily criticized by the GAO, DOL's IG, and Congress due to the difficult administrative burdens placed on growers.

- The Administration has acknowledged the problems and is working administratively to reengineer and streamline the H-2A program to ease grower burdens while maintaining strong worker protections.

- In the recent letter to the Commerce, Justice, and State appropriations conferees, the Administration strongly urged deleting the Agricultural Job Opportunity, Benefits, and Security Act of 1998. The bill in its current form is unacceptable. However, the Administration is engaging in a bi-partisan process with the Congress to develop overall reform, including possible legislative reform.

- The Administration shares the goal of assuring an adequate, predictable labor supply of farm workers and will work with the Congress to develop reforms to the current program to ensure that it responds to agricultural needs while protecting U.S. farm workers.

Wyden-Graham Bill.

- As a result of growers' dissatisfaction with the current program, Senator Wyden (D/OR) and Senator Graham (D/FL) attached the Agricultural Job Opportunity Benefits and Security Act of 1998, to the Commerce, Justice, State appropriations bill.

- The Administration's overall concern with the Wyden-Graham bill is that it <u>shifts costs and risks from employers to workers and/or the government</u>.

- Although Wyden-Graham has been changed to remove some objectionable provisions (e.g., restores the requirement that growers reimburse workers for transportation; eliminates the provision that would have required withholding 20% of workers' wages to be refunded upon their return home as a repatriation incentive), the fundamental substantive objections noted below, remain.

<u>*Most significant issues with the revised proposal.*</u>

- <u>Eliminates the current grower recruitment requirement and creates a government-run job registry</u>.

  --Responsibility for the recruitment of domestic farm workers would shift to a new "job registry" for which the government and low-wage workers are entirely responsible.

  --Growers would only need to check this registry before employing H-2A workers.

  --The fundamental problems with the registry are:

  (1) that use of the registry would relieve the growers of any obligation to do positive recruitment beyond searching the registry, making it easier to employ H-2A workers over U.S. workers; and,

(2) that the bill would require wholesale reliance on a method of recruitment that has not been tested or shown to be effective (it will be very difficult to maintain an accurate, up-to-date registry).

--In addition, although this registry would take years to create and implement effectively, employers could begin to hire H-2A workers within 6 months of enactment of the bill.

- Erodes U.S. worker wages.

  --Caps the adverse effect wage rate[1] at 105% of the local prevailing wage.

  --This cap is not set high enough to compensate for the depression of wages in areas where there is a heavy reliance on foreign workers, and not sufficiently high to attract new U.S. workers into agricultural employment.

- Provides an inadequate mechanism for housing foreign guest workers.

  --Allows growers to provide a payment voucher in lieu of housing, unless the State certifies that adequate housing is not available in the area. The State is not required to make this determination nor has an incentive to do so.

  --Requires growers to make a "good faith" effort to locate housing for the worker. Growers are not required to locate and secure the housing.

  --Eliminates a fundamental grower obligation to assure that workers are adequately housed.

  --Overlooks the basic problem of inadequate housing in many areas of the country (particularly in the West).

  --It is unrealistic to expect low-wage foreign migrant farm workers to be able to secure housing using a federal voucher. Thus, many workers will likely end up without housing, will overcrowd any available rental housing, or will end up on the street.

- Eliminates the requirement that growers guarantee ¾ of the work offered to recruit U.S. and foreign farm workers.

  --May encourage growers to lure workers from hundreds or thousands of miles away with the promise of potentially high earnings without any obligation to fulfill any part of that promise.

  --May encourage growers to recruit more workers than they actually need to hedge against

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[1]The adverse effect wage rate (AEWR) is equal to the average statewide wage. The use of the AEWR reflects the fact that foreign workers (both undocumented and H-2A guest workers) can sometimes dominate a local labor market and depress the local prevailing wage.

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uncertainties.

October 9, 1998

Wages

Background

Under the H-2A program, growers who employ H-2A workers are required to pay their workers the higher of the prevailing wage (determined by the average wage for the crop in the local area), the federal, state or local minimum wage or an "adverse effect wage rate" (AEWR) (equal to the average statewide agricultural wage rate). Because foreign workers can sometimes dominate a local labor market, this wage depression is often reflected in the local prevailing wage. The AEWR partially corrects for this depressive effect by measuring farmworker wages on a statewide basis -- thus dissipating the impact of foreign workers on the wage.

Under the Wyden-Graham bill, the worker is required to be paid either the prevailing wage or the AEWR (capped at 105% of the prevailing wage). This cap is not likely set high enough to compensate for the depression of wages in areas where there is a heavy reliance on foreign workers.

Wages are just one piece of the growers's total compensation calculation (which also includes housing, transportation and taxes). The impact of wage on the total compensation package varies by area of the country and by crop; e.g., for growers who do not now provide housing, the program's housing requirement is more significant. However, when considering wage levels generally, we should keep three things in mind: (1) that we want to set the wage high enough to continue to attract U.S. farmworkers; (2) that we don't want the wage to be prohibitively high for growers; and (3) that whatever the total compensation required in the H-2A program, it will become a compensation ceiling for U.S. workers.

Some within the USDA believe that if the H-2A wage (or total compensation) is set too high (high enough to attract new U.S. workers) it would drive growers into the illegal labor market. The DOL argues that agricultural wages have been kept artificially low because of the large presence of undocumented workers and that if agricultural wages were allowed to rise, U.S. workers could satisfy the growers's needs.

Why the H-2A wage would become a wage ceiling for U.S. workers:

The conceptual problem is that growers have a choice between three categories of workers: legal U.S. workers, illegal workers, and H-2A workers. Which category they draw from is almost exclusively determined by total cost. For example, if the total cost of hiring a U.S. worker (including wages, taxes, housing, etc.) is higher than the total cost of hiring an H-2A worker, the grower will hire the H-2A worker. Therefore, the total compensation offered by the H-2A program becomes the effective total compensation ceiling for U.S. workers. In addition, the presence of large numbers of illegal farmworkers distorts the labor market such that the growers' response to an inability to find sufficient legal U.S. workers is to hire illegal workers, rather than increase wages or improve working conditions. Thus, though it may be desirable to require fair wages and working conditions in the H-2A program, if the cost of using the program is too high, the growers will hire undocumented workers (as long as their risk of being raided by the INS remains low).

Potential Wage Options

The following represent three (conceptual) options calculating the wage H-2A employers are required to pay their workers. We are in the process of gathering more information about prevailing wage and AEWR levels and are considering how the following options could actually be implemented.

1. **Do not change the wage calculation.**
According to USDA's chief economist, growers do not generally cite "too high wage requirement" or "unfair wage requirement" as a reason not to use the H-2A program. Rather, their complaints have focused on (1) that the program is too cumbersome and bureaucratic, and thus not responsive enough to their needs; and (2) the housing requirement. Therefore, a change in the wage structure may not need to be part of our reform package. The advantage of not changing the wage calculation is that it would allow us to focus on more controversial and important aspects of the program rather than developing an ad-hoc "fix" to what may not be a big problem. In addition, because the AEWR is at a more aggregated level (state-wide, rather than locally calculated), it will be less vulnerable to becoming a wage ceiling for U.S. workers should the H-2A program expand. However, should the H-2A program dominate the labor market for agricultural workers, any H-2A wage based on agricultural workers would become a ceiling for U.S. workers.

Because the Wyden-Graham bill changes the calculation of the required wage, we may need to remain open to some of the following options, even if our best recommendation is that the wage calculation should not be changed. As noted, we are in the process of gathering data from DOL comparing the AEWR to the prevailing wage, by crop and by area. This will give us a better idea of what the effect of a change from the AEWR to some calculation above the prevailing wage would be.

2. **Eliminate use of the AEWR and base the required wage on some percentile in the distribution of the prevailing wage.**
We could consider eliminating use of the AEWR because as a statewide average of all agricultural products, it does not accurately reflect the wages for a particular crop in a particular area. One alternative would be to rely solely on some upper percentile in the distribution of the prevailing wage (which is based on surveys of growers by crop and area). The reason for using an upper percentile is three-fold: (1) prevailing wage data is generally one-year old; (2) to adjust for the potentially depressing effect of undocumented

workers on wages; and (3) to prevent a low wage ceiling from developing for U.S. workers. We would also want to make sure that any prevailing wage calculation include the 8 ½% in FICA/FUDA taxes that are paid for domestic workers, but not for foreign workers. As part of the ongoing process, we could determine how best to use this 8 ½%.

The most difficult part of this formula is figuring out where on the distribution to set the wage. In the Wyden-Graham bill, the AEWR is capped at 105% of prevailing wage. Though this may be an appropriate off-set in areas where the prevailing wage is a decent wage, it would likely not be sufficient in areas where there is a heavy concentration of illegal workers. Again, we need to know more about how prevailing wages compare to the AEWR in a variety of crops and areas before we can determine a precise percentile. Also, the percentile of the prevailing wage used may depend on the total compensation package (i.e., what the grower's costs are for housing, transportation, and taxes).

3. **Eliminate use of the AEWR and base the required wage on the wages that U.S. workers earn in other low-skilled jobs that are not dominated by undocumented workers.**
As noted, exclusive reliance on the prevailing wage is problematic, in part, because if the H-2A program were to become large enough, the prevailing wage would become an effective wage ceiling for U.S. farmworkers. However, basing the required wage on the wages paid in other low-skilled occupations would allow the wages paid through the H-2A program to rise and fall with the rest of the labor market for low-skilled workers. The disadvantage of this approach is that it may be difficult to implement (1) because of the difficulty in identifying other low-wage occupations or industries that are not dominated by undocumented workers; and (2) because some low-skilled jobs may require skills that farmworkes do not have (like English-language acquisition) and thus would not be fair comparisons.

4. **Eliminate use of the AEWR and base the required wage on the wages that U.S. farmworkers earn on other (nonagricultural) jobs throughout the year.**
The *National Agricultural Workers Survey* (an annual survey of 25,000 workers) asks farm workers about their employment on other (non-agricultural) jobs throughout the year. The wages on these jobs could potentially provide the basis for the required wage for the H-2A program. This approach contains many of the same advantages as option 3, above. We're still looking into the details of this survey.

Through conversations with economists from USDA, DOL and CEA we have concluded that there is much that we still need to know to be able to adequately address the wage issue. For example, we have not yet been able to analyze a comparison between the AEWR and the prevailing wage, broken down by crop and area. We also have not obtained information that breaks down the total compensation package paid by an H-2A grower (housing; transportation; wage) by crop and area. Without this information, it is difficult to determine which of the preceding options would be best.

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MEMORANDUM FOR ELENA KAGAN AND SALLY KATZEN

FROM: JULIE FERNANDES AND CECILIA ROUSE

SUBJECT: ASSESSMENT OF H-2A "IDEAS INVENTORY"

DATE: July 8, 1999

Attached is our assessment of the positions of USDA and DOL regarding the proposals put forth in DOL's "ideas inventory." The shaded boxes indicate important proposals for which there is agency disagreement and thus should be discussed at today's meeting. We have also attached a list of the current program requirements that includes definitions of the most important terms.

In order to better understand the agencies' positions, it is useful to understand the underlying policy tensions. Growers see themselves as having a choice between three categories of workers: legal U.S. workers, illegal workers, and H-2A workers. Which category they draw from is almost exclusively determined by total cost. For example, if the total cost of hiring a U.S. worker (including wages, taxes, housing, etc.) is higher than the total cost of hiring an H-2A worker, the grower will hire the H-2A worker. Therefore, the total compensation offered by the H-2A program becomes the effective total compensation ceiling for U.S. workers. In addition, the presence of large numbers of illegal farmworkers distorts the labor market such that the growers' response to an inability to find sufficient legal U.S. workers is to hire illegal workers, rather than increase wages or improve working conditions. Thus, though we may want to require fair wages and working conditions in the H-2A program, if the cost of using the program is too high, the growers will hire undocumented workers.

USDA's goal is to provide a steady, reliable source of farmworkers for U.S. growers. USDA believes that the domestic labor force can never completely satisfy the labor needs of agriculture, particularly during peak times, and therefore there will always be a need for temporary foreign agricultural workers. In a world in which the INS is increasingly cracking down on the employment of undocumented workers, the USDA (and the growers) would prefer that the foreign workers that they employ be authorized to work. Their goal is thus to set a wage (or total compensation) floor that is low enough that growers will readily use the H-2A program (rather than hire undocumented workers), but that is high enough to continue to attract existing U.S. farmworkers. However, they believe that an H-2A program that would set the wage (or total compensation) floor high enough to attract many more U.S. workers would drive growers into the illegal labor market.

DOL is concerned that a low wage (or total compensation) floor becomes a low ceiling for U.S. workers and therefore hurts these already impoverished workers. They are not as convinced that the domestic labor force could never satisfy growers needs at a reasonable wage; rather, they argue that agricultural wages have been kept artificially low because of the large presence of undocumented workers. Labor believes that if agricultural wages were allowed to rise, additional U.S. workers would be willing to work in agriculture. They also assert that we can do a better job of facilitating matches between workers and employers that would give domestic farm workers more stable employment and growers access to a steady supply of workers.

As you read through the following list of proposals, you will notice that in many areas (e.g., wages, housing, transportation) the issue is whether the proposal increases the total cost to the employer or shifts those costs to the government or the farmworker. USDA generally opposes reforms that would increase grower costs. The Labor Department generally opposes reforms that transfer costs to the government or the farmworker, and favors reforms that aim at improving labor conditions or wages for U.S. and foreign farmworkers. Because the focus is on total costs (with wages and housing being the most significant areas of concern) we cannot decide on individual reform components in isolation.

Requirements (and Definitions) under the Current H-2A Program

- **Recruitment**: The agricultural employer must engage in independent positive (i.e., active) recruitment of U.S. workers, including newspaper and radio advertising in areas of expected labor supply. Such recruitment must be at least equivalent to that conducted by non-H-2A agricultural employers to secure U.S. workers.

- **Wages**: Employers must pay H-2A workers the "**adverse effect wage rate**" (**AEWR**), the applicable prevailing wage rate, or the statutory minimum wage rate, whichever is higher. The AEWRs are the minimum wage rates which the DOL has determined must be offered and paid to U.S. and H-2A workers, and they are established for each state. The region- or state-wide AEWR for all agricultural employment for which H-2A certification is being sought, is equal to the annual weighted average hourly wage rate for field and livestock workers (combined) for the region as published annually by the USDA.[1] The AEWRs are designed to prevent the employment of these nonimmigrant alien workers from adversely affecting the wages of similarly employed U.S. agricultural workers.

- **Housing**: The employer must provide free and approved housing to all workers, both foreign and domestic, who are not able to return to their residences the same day.

- **Meals**: The employer must provide either three meals a day to each worker or furnish free and convenient cooking/kitchen facilities. If meals are provided, then the employer may charge each worker a certain amount per day for these meals.

- **Transportation**: The employer is responsible for the following types of transportation for workers: 1) After a worker has completed fifty percent of the work contract period, the employer must reimburse the worker for the cost of transportation and subsistence from the place of recruitment to the place of work; 2) The employer must provide free transportation between any required housing site and the work site for any worker who is eligible for such housing; 3) Upon completion of the work contract, the employer must pay return transportation to the worker's prior residence or transportation to the next job.

- **Workers' Compensation Insurance**: The employer must provide Workers' Compensation or equivalent insurance for all workers, both foreign and domestic.

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[1]Some 1998 AEWRs: California, $6.87; Florida, $6.77; Georgia, $6.30; Hawaii, $8.83; Kentucky, $5.92; and Ohio, $7.18.

- **Three-fourths Guarantee**: The employer must guarantee to offer each worker employment for at least three-fourths of the workdays in the work contract and any extensions. In applying this guarantee and determining any additional wages due, the following facts must be established: 1) The beginning and ending dates of employment; 2) The number of workdays between the established beginning and ending dates of the guarantee period; and 3)The hours of worktime for the guarantee. The guarantee is then established by computing seventy-five percent of the established total hours of work time in the contract period. Note that the employer may not count any hours offered on such days in which the worker refused or failed to work.

- **Fifty Percent Rule**: The employer must employ any qualified U.S. worker who applies for an available job until fifty percent of the contract period has elapsed.

- **Tools and Supplies**: The employer must furnish at no cost to the worker all necessary tools and supplies, unless it is common practice for the worker to provide certain items.

- **Labor Dispute**: The employer must ensure that the available job for which the employer is requesting H-2A certification is not vacant due to a strike or lockout.

- **Certification Fee**: A fee will be charged to an employer granted temporary alien agricultural labor certification. The fee is \$100, plus \$10 for each available job certified, up to a maximum fee of \$1,000 for each certification granted.

- **Farm Labor Contractors (Crewleaders)**: A farm labor contractor is an organization or entity that either supervises, recruits, transports, houses, or solicits farm labor other than the owner of the work site. Bona fide registered farm labor contractors may be eligible to apply for and receive H-2A certification, although they generally deal with domestic laborers. Farm labor contractors would be required, as employers, to provide all the minimum benefits specified by the H-2A regulations, including the three-fourths guarantee and the fifty percent rule.

Reform Proposal	WH	USDA	DOL
Worker Recruitment			
Require "positive recruitment" of U.S. farmworkers by growers only in areas where DOL finds that there are a	Y	Okay	DOL implemented this administrative change.

significant number of qualified workers willing to make themselves available for employment at the time and place needed.			
Count as "available" for employment only those U.S. workers who are identified by name, address, and SSN	Y	Okay	DOL implemented this administrative change.
Post employers' H-2A job orders on America's job bank	Y	USDA would not oppose.	DOL proposal; requires job order simplification.
Strengthen the MSPA program of registering farm labor contractors to require bonding; allow H-2A employers to require bonding as a condition of employing a farm labor contractor.	Y	DOL and USDA agree to support this.	
Allow H-2A growers to include a bonding requirement for FLCs they employ.	Y	DOL and USDA agree to support this (essentially the same as the previous proposal).	
Eliminate the requirement that farm labor contractors must be used by H-2A growers if the use is the prevailing practice in the area.	N	USDA generally wants more flexibility for growers, however they are unlikely to strongly oppose DOL's opposition.	DOL strongly opposes because the goal is for the H-2A program to track prevailing practices in areas of labor protection.
Provide an exception from current program requirement to use FLCs for any FLC who has a demonstrated history of employing illegal workers or other serious labor abuses.	Y	USDA agrees.	DOL regulatory initiative.
Require use of FLCs as recruitment mechanism whenever use is "common" or "normal" (not prevailing) in an area.	N	USDA will likely oppose because grower regulations should involve the highest standard.	DOL generally supports prevailing practice. This is not likely an issue about which DOL will take a strong position.
Require payment of competitive rates for FLC services.			
Employment Eligibility Verification			
DOL work with Congress and other affected agencies to develop a reliable means of verifying individual's	Y	USDA would likely agree because of their goal to decrease growers' dependence on	DOL agrees.

authorization to work as they are hired.		undocumented workers as long as growers had increased access to H-2A workers.	
Create a national employment eligibility verification system so that employers can check on the legal status of domestic workers who are hired during the H-2A process.	Y	INS currently has a pilot program to do just that which we support and has encouraged growers to participate in the pilot.	
Require growers using the H-2A program to use INS pilot employment eligibility verification system.	Y	USDA would likely agree as part of an overall package.	DOL would likely agree.
Growers only responsible for recruiting and hiring farm workers in the U.S. through the DOL-administered Registries (and contacting former employees); Registries are responsible -- and have only 14 days -- to locate, contact, verify employment eligibility, and refer U.S. workers to growers seeking foreign farm workers; failure to refer timely or to refer sufficient workers allows direct application for workers to Secy of State.	N	USDA likely supports this provision because it reduces the burden on employers.	DOL hates this provision because it leaves the burden of recruitment entirely to the Federal government.
Secy of State authorizes additional H-2A workers if Registry-referred workers fail to report; are "not ready, willing, able, or qualified" to do the work; or, abandon or are terminated from employment.	N	USDA likely supports this provision because it provides growers with quick access to H-2A workers if they have cannot recruit U.S. workers through the registry.	DOL would likely hate this provision because, again, it centralizes all recruitment through the Registry and absolves growers of any additional recruitment before applying for H-2A workers.
Pilot test new Registry of available U.S. farm workers; growers share responsibility for positive recruitment of U.S. farm workers.	Y	USDA would likely support a pilot of a mechanism to facilitate the hiring of U.S. workers for growers.	DOL supports a pilot of such a registry (as long as growers continue to share part of the responsibility for recruitment).
Require employers' "positive recruitment" to include: providing an 800 contact telephone number and accepting "collect" calls from worker job applicants; contacting other potential employers to link a series of job opportunities; and developing a long-term recruitment plan to reduce dependence on foreign guestworkers.	N	USDA would likely oppose such positive recruitment measures because it increases the costs to employers.	DOL would likely support these measures, but are unlikely to require that they be part of a final package.
H-2A workers covered by the MSPA, but disclosure only	N	USDA likely supports this measure.	DOL supports having H-2A workers covered

required at time of visa issuance.			by MSPA but likely believes that the workers should be informed of their rights when recruited rather than at the time of visa issuance (which could be after the worker has incurred significant costs).
DOL rulemaking regarding possible consolidation of agricultural job orders in the Interstate Clearance System.	Y	USDA agrees.	DOL agrees
Productivity Standards			
H-2A employers allowed to set minimum production standards after a "3-day break-in period."	?		
Employer-established productivity standards and quality requirements should be permitted only if they are the prevailing practice among non-H-2A employers, are bona fide, objective, justifiable, fully disclosed and implemented on a fair and equitable basis.		USDA generally opposes any additional regulations or restrictions on growers and would therefore likely oppose this idea.	DOL would likely support this idea as it is aimed at protecting U.S. workers.
Experience (and related) Requirements			
H-2A employers should be allowed to specify "agricultural experience" as a condition for hiring U.S. farm workers.		USDA would likely support because it ultimately gives the growers more flexibility in who they hire.	DOL would likely oppose arguing that it gives growers too much discretion for jobs that generally do not require substantial experience.
Disallow job qualifications, experience and reference requirements unless they are the prevailing practice among non-H-2A employers and are otherwise job-related and bona fide.		USDA would likely oppose for the same reasons that they would support specifying "agricultural experience."	DOL would likely support for the same reasons they would oppose specifying "agricultural experience."
Allow H-2A workers to move from one certified H-2A employer to another, with the final employer responsible for return transportation costs.	Y	This is current law.	According to DOL, this is current law.

Prohibit H-2A job orders that consolidate seasons and different crops.		USDA would likely oppose because consolidation would potentially decrease costs to growers by allowing them to group together and reduce the number of individual applications.	DOL would likely support because it protects U.S. farm workers by requiring growers to submit individual applications.
Prohibit use of the H-2A program in designated labor surplus areas.	N	USDA may not disagree in theory but would likely be concerned that the designation of a labor surplus areas would not necessarily reflect the short-term labor needs of particular growers with particular crops.	DOL would support this in theory, however it would likely have concerns about how areas are designated.
Wages and Costs			
Revise H-2A regulations regarding the 3/4 guarantee to remove incentives to growers to overestimate the contract period.	Y	Agrees.	Agrees.
Consider applying the 3/4 guarantee incrementally during the contract period.	N	Oppose.	Opposes.
Eliminate the 3/4 guarantee.	N	Doesn't like the 3/4 guarantee b/c wants growers not to have to pay workers if their crop is disappointing (less work in fact than they anticipated). However, they understand that this is a more generous rule than under the MSPA (the statute that governs non-H2A farmworkers) and thus agrees that this reform is no good.	Opposes the elimination of the 3/4 guarantee (b/c protects farmworkers by ensuring that the work that they are promised in the contract is provided, thus allowing them to make fairer judgments when choosing between jobs). However, not sure that 3/4 is a magic number.
Modify the 3/4 guarantee to allow H-2A growers to limit the contract period to "duration of crop activity" and terminate the contract period offered due to changes in market conditions.	N	Agree that effectively eliminates the 3/4 guarantee.	Agree that effectively eliminates the 3/4 guarantee.

Eliminate AEWR and instead require payment of 105% of prevailing wage for crop in the area.		Yes. They are in favor of eliminating the AEWR b/c it provides a wage higher than the prevailing wage for some H2A workers. USDA does not agree that the prevailing wage is depressed by the presence of illegals in the workforce, but does not object to a small sweetener to the prevailing wage to replace the AEWR (like the 105% proposed by Wyden).	No. The AEWR is calculated to compensate for the presence of illegals that depress the prevailing wage rate. It calculates the required wage as the state-wide average of all non-managerial farmworkers, thus dispersing the impact of illegals. If the wage is calculated based on 105% of prevailing, it will still be a depressed wage in those industries or areas where the presence of illegals is large. However, DOL agrees that the AEWR is a bit of an odd way to calculate, and that there is no magic to it. They want some way to calculate the wage that compensates both for the presence of illegals (wage depression) and for the fact that growers do not pay H2A workers FICA/FUDA (approx. 8%). AEWR may not be magic, but 105% of prevailing does not even get the wage = to that of non-H2A workers.
Eliminate AEWR and require payment of the prevailing wage for the crop in the area.		USDA likes this option. They want the H2A wages to be the same as the prevailing wage in the crop and area. They dispute that wages are depressed b/c of the presence of illegals. In addition, they maintain that if the program requires a higher wage than what is being paid locally, the growers will not use the H2A program and will access the undocumented workforce.	Labor hates this idea, for the reasons above. The wage paid to H2A workers should be a fair wage -- defined as one that compensates for the wage depression caused by the presence of illegals. Labor believes that growers should have to go to the U.S. market first, offer a fair wage and good conditions, and if not successful, access an H2A market that compels them to pay a fair wage under good conditions.
Only require payment of federal minimum wage (not AEWR) as a "training wage" for inexperienced workers during a training period (in the K).		Another way to undercut the AEWR that USDA likes.	Another way to undercut the AEWR that Labor hates.
Require increases in piece rates to reflect increases in the		USDA would likely not like. This would raise	Labor would like. Most farmworkers are paid

AEWR.	Y	the total wage cost.	by the piece, so a conversion of the piece rate to the AEWR is consistent with their desire to keep or strengthen the AEWR.
Prohibit H-2A employers from increasing productivity requirements to offset increases in the AEWR.	Y	USDA would likely not like b/c this would raise the total wage cost and require farmers to set productivity levels early in the season and not allow conditions to change expectations.	Labor would like this. It discourages the farmers from changing productivity levels in ways designed to keep the wage low.
Change AEWR methodology to set at 90th percentile of local market wage or 80th percentile of regional market wage.		They are generally opposed to any change that would increase the overall wage cost. However, they may be open to setting the wage at some modest percentage higher than the local prevailing wage. Thus, though these numbers are high, there may be room to work here.	Labor is generally in favor of calculations that result in a higher wage, though they see no magic in the AEWR. The conflict with USDA would be over how high to set the percentile.
Apply AEWR to sheepherders.	?	Opposed. Sheepherders are different.	They want more for the sheepherders.
Disallow any wage deductions by H-2A employers that reduce earnings below the highest required wage.		USDA would favor changes along these lines. They want to consider total cost of employing an H2A worker and compare that to total cost of hiring a non-H2A worker (legal or illegal).	Oppose. Though Labor is open to discussions that take into account total cost to growers to use the program, they do not want the farmworker wages to be too low.
Prohibit H-2A employers from fixing uniform wage rates across large areas -- states or regions.	?		
Reforms to the 50% rule as recommended by OIG.	Y	USDA agrees.	Labor agrees.
Modify existing 50% rule to only require hiring of local workers (that reside within commuting distance) but extend this obligation to the entire period of the contract.	N	Oppose. Blocks out of state U.S. crews from work.	Oppose. same reason.
Eliminate 50% rule except for workers referred through the registries *unless* there are other substantially similar job opportunities in the area.	Y	Would agree to apply the 50% rule only where equivalent jobs are not available in the area. This is currently the rule where the association in the employer. Also agrees that the 50% rule	Agrees.

		is good for U.S. workers.	
H-2A workers should be covered under the State Unemployment Insurance System	Y	This could increase grower cost, but unlikely that they would oppose this.	Likely favor, though there is a question of whether this would only apply where U.S. farmworkers are covered under state law.
H-2A employers expressly authorized to pay hourly wage, piece rate, task rate, or "other incentive payment method, including a group rate," irrespective of the prevailing payment method.	N	USDA might like this b/c it gives flexibility to growers.	Labor will hate this, b/c they have asserted that the task rate is too variable to be susceptible to a prevailing wage determination. There are also likely problems with the "group rate."
H-2A employers are in compliance with the wage requirements if "the average of the hourly earnings of the workers, taken as a group," equals the required hourly wage.	N	USDA may like this, but fairness concerns weigh against it.	Labor will not like this b/c it allow the growers to pay some workers less than the required hourly wage.
Prohibit payment by "task rate" or other variable rate method of payment.	Y	May not like b/c like grower choice.	Would likely favor. Have spoken out against the task rate.
Protect earnings level when employers convert from a piece rate to an hourly rate.	Y	USDA likely would not oppose, b/c it only holds the rate the same.	Protecting wage rates would seem a good thing to Labor.
For employers converting from hourly rate to piece rate, set piece rate to assure earnings at least 30% above AEWR.		This is another way to sweeten the wage that USDA will likely oppose.	This is another way to sweeten the wage that DOL will like, but it is -- in a way -- difficult to defend (unless you assume that growers are setting piece rates at levels well below the AEWR conversion).
H-2A workers apply for transportation reimbursement to the government (rather than the employer).		This is a shift of cost from the grower to the government. USDA will like this.	Labor does not like, for the same reason. However, as long as the cost to the grower remains the same for a U.S. worker (working under fair wages and good conditions) and an H2A worker, DOL will not fight if some overall costs are picked up by the government (as long as the cost is not coming out of their budget!).
H-2A workers may apply to the employer for		USDA may like this, b/c lowers cost for the	DOL will oppose. They want H2A workers to

transportation reimbursement, but employer not obligated to provide such reimbursement.	N	grower. However, growers are used to paying transportation costs in this program. This cost is just part of the overall cost, and thus would go into the overall cost calculation (which, according to USDA, determines whether a grower will participate or hire illegals).	have transportation paid for. However, as noted, they may be amenable to a system that has the government assume some of this cost.
H-2A workers not eligible for transportation reimbursement if distance traveled is less than 100 miles.	?	This is part of the cost calculation. USDA may think that this is a small step in the right direction.	Labor would likely oppose as eroding the transportation guarantee. Not likely a big issue for either side.
Pilot program for transportation advances for U.S. farmworkers.	Y	USDA would likely be open to this.	DOL would also likely be open to this (a *small* pilot).
Require H-2A employers to provide travel advances to U.S. farmworkers.			
Charge fee = FICA/FUDA taxes to finance certain program activities (housing; admin. costs; transportation).	Y	USDA is in favor. The question is how high is the fee.	Labor is not opposed to a fee that would fund certain activities. The question is how high is the fee (more than FICA/FUDA?)
Impose user fees that reflect the cost of the H-2A program.		First, we are not sure how to calculate this cost (particularly, the cost of housing). Even if we could, USDA would be concerned that it would be too high (and thus cost prohibitive for growers to use). They are open, though, to a modest user fee.	As noted, Labor is also open to a user fee. However, it is not clear that they would want to push for a fee that was a total reimbursement (making it cost neutral for the government). That would surely make it too expensive for growers to use.
Allow H-2A workers to opt out of the employer-provided meal plans.		Unclear how they would react to this.	Labor would likely think this is o.k., b/c under the current system the cost of meals is deducted from the farmworker wages. However, there is some concern about making sure that workers don't opt out and then not have adequate food for the harvest.
Require first time H-2A employers to maintain wages and working conditions previously offered.		USDA would oppose this as restricting grower flexibility.	Labor would likely favor, but it could be hard to administer.

Housing			
Apply local or state (rather than federal) housing standards to housing provided by H-2A growers.		USDA would likely favor (local laws could give more flexibility) , but it is just a race to the bottom. They could be convinced that federal standards should apply in a federal program.	Labor would likely oppose. Would want federal standards to apply in this federal program. Also, would assume that federal standards are stricter.
H-2A employers permitted to charge workers up to fair market value for the cost of maintenance and utilities provided.		USDA likes as a way to reduce cost.	Labor would consider shifting some maintenance or modest utilities fees to the worker.
H-2A employers can charge workers reasonable amounts (up to $25 per week) for the cost of maintenance, utilities, repair and clean-up of housing provided.		Same	Same
H-2A employers can charge a security deposit (up to $50) to protect against "gross negligence or willful destruction of property."		USDA likes as a way to share some costs with farmworkers and make them responsible for taking care of grower-provided housing.	Labor in general would not like, b/c unnecessary under the current law (which allows for worker to pay for damage in some circumstances).
H-2A employers may require reimbursement (wage deduction) from responsible worker of reasonable cost of repairing damage to housing provided that is "not the result of normal wear and tear."	Y	According to DOL and USDA, this is current law.	
Reduced user fee to H-2A growers providing housing.		This is just another way to think about total cost to growers. If we have a user fee, we have to think about what we want it to pay for.	
H-2A employers may provide a "minimum housing allowance" in lieu of housing, unless (no earlier than 8 years after enactment) a state Governor certifies that there is not adequate farm worker housing available.		USDA would like as a cheaper way to meet the housing requirement. However, they may be open to the argument that this could result in stronly adverse impacts on local communities (migrant workers sleeping in parks, etc.)	Labor hates this. First, there is a shortage of affordable housing generally (which is particularly acute in rural areas). Second, it is unreasonable to expect a migrant worker from another country to be able to rent any housing

			on his own with a federal voucher.
H-2A employers may provide a "minimum housing allowance" in lieu of housing, but must also arrange for decent housing at the allowance level.		This option is really no different from the current system, except that the method of payment is a voucher, rather than directly paid for by the grower. Thus, to the extent that USDA does not like the current system (b/c the cost associated with providing housing is very high), they would not like this.	This is better than above, but does not address the fact of great shortages of decent, affordable housing in rural areas. Under this system, what happens if housing is not available? Labor would still like some kind of requirement that the employer provide for housing where it is not available.
Require growers to provide free housing to all U.S. farm workers (including local workers).		USDA would not like this additional cost burden on the growers.	Labor would like as an ideal, but unrealistic to add this additional burden on growers (unless heavily subsidized by the federal government).
Require H-2A growers to make their housing available for U.S. workers who arrive early.		Can't see the objection to this one.	Labor likely is in favor.
Enforcement			
Extend to Wage & Hour the authority to debar violating employers who commit serious labor standards or H-2A program violations.	Y	USDA and DOL agreed to this during our earlier process. Will be part of upcoming rulemaking.	
Issue final H-2A regulations.	Y	DOL has agreed to this.	
Narrow DOL enforcement to only allow investigations only pursuant to a complaint.	N	USDA may like this, but not sure. It would be difficult for them to argue in favor of less enforcement, when there is so little already.	DOL would hate this. They need more not less enforcement money and tools.
Institute a 12-mo. statute of limitations on complaints		USDA likely would favor.	DOL may think this is o.k.
Provide a "reasonable cause" threshold for investigations.		USDA would likely favor.	DOL may want to reserve the right to do random inspections.

Limit penalties to certain types of violations.		Unclear what this recommendation means.	
Institute a three-year and permanent debarment period for repeat violations.		USDA would likely favor.	DOL would likely favor, unless this is substantially less than current law.
Require hiring of former H-2A workers (where allowed) to offset disincentives to complain about labor violations.		USDA would oppose. This too greatly limits grower flexibility in hiring.	Not sure if DOL would see this as an effective tool to offset disincentives to complain about labor violations.
Require disclosure of terms and conditions of employment to be given to workers in their native language in plain language.		Can't imagine opposition, unless it costs a lot.	Labor would likely favor.
More timely initiation and completion of DOL enforcement actions.		We are all in favor of timeliness.	
Immigration Management			
H2A worker ineligible for continued participation in the program if, during the prior 5 years, the worker violates the terms of admission to the U.S.		USDA would not likely have an opposition to this in theory.	DOL would not likely have an opposition to this in theory.
H2A workers admitted to the U.S. have 14 days after termination of employment contract to search for other legal work in the U.S.	Y	USDA would not likely have an objection.	DOL would not likely have an objection.
H2A workers admitted must be issued fraud-resistant identification/work authorization documents.	Y	USDA would not likely have an objection.	DOL would not likely have an objection.
An employer may file for extension of stay to employ an H2A worker already in the country and may legally employ such a worker from the date application is made.		USDA would likely support this idea because it provides growers with easy and quick access to H-2A workers.	DOL would likely oppose this idea because it would allow growers to get around the recruitment requirement.
AG study whether H2A workers timely depart the U.S. after period of authorized employment.	Y	.	

Legalization for H2A workers who complete at least 6 months employment in the U.S. under the H2A program for 4 consecutive years in compliance with program requirements.	N	USDA would not likely oppose this idea. However, it does not advance their goals because they believe that growers need a ready supply of foreign workers to meet short-term labor needs. Once legalized these foreign farmer workers would likely move into other sectors of the labor market.	DOL is opposed because it a) it gives the employers additional leverage over the workers by empowering them to hold the promise of a green card out to the foreign worker and b) it undercuts our immigration policy.
Require withholding of percentage of H2A workers wages, deposited in accounts reclaimable within limited time period in home country, as incentive to repatriate.	N	USDA supports incentives to repatriate and if they believed that if this would work they would support it.	DOL would likely oppose this because 1) there is no guarantee that the workers would actually receive these wages and 2) there is no evidence that this amount of money would be an incentive to repatriate.
User fee offsetting FICA/FUDA advantage used as repatriation incentive	N	Same position as above.	Same position as above.
Require entry-exit control system for all H2A workers.	Y	If this were possible, USDA and DOL would support it. However, at this time INS is unable to operate an effective exit and entry control system on the land borders.	
Other issues			
Expand scope of the H2A program to include agricultural -- meat/poultry -- processing employment.			
Secretary authorized to establish cap on number of H2A visas issued pursuant to application from "independent contractors, agricultural associations and such similar entities."	Y	USDA would likely support this as long as it was a high cap.	DOL supports this provision since 80% of all H-2A applications are from independent contractors or agricultural associations.
Comprehensive report by AG and Secretaries of Labor and Agriculture.	Y		
All H2A employers non-wage practices and benefits should		USDA will want more flexibility for growers.	DOL would likely favor tieing all practices and

be subject to prevailing practice standards.			benefits to prevailing practice standards.
Assure that U.S. and H2A workers are truly allowed to choose their employer			
Cap the number of visas available under the H2A program.		See above.	See above.
Administrative Processes			
Consolidate DOL certification and INS petition approval into one process administered by DOL	Y		
Consolidate responsibility within DOL in Wage & Hour for post-application examination and enforcement of employer compliance with H2A program requirements.	Y		
Government -- not employer -- responsible for reimbursing transportation costs of eligible workers.	Y		
Require employers' H2A labor certification applications to be submitted 45 (rather than 60) days before the employer "date of need."	Y		
Reduce lead time for employer applications to 30 (rather than 60) days before "date of need."	Y		
Consistently meet 7 day deadline -- after initial receipt of employer's labor certification application -- to give written notification to the employer of deficiencies precluding adjudication of the application.	Y		
Consistently meet existing 20 day deadline -- prior to employer's date of need -- to issue approved certifications	Y		
After consolidation of certification and petition adjudication process in DOL, change the law to set	Y		

deadline for DOL approval of employers' application to 7 days before date of need.			
Reduce the deadline for employer-provided housing to be available for inspection to 15 (rather than 30) days before the date of need.	Y		
Change the current labor certification to one based on employers' attestations to comply with program requirements.	?	Unsure how this changes employer obligations.	

DRAFT

SUMMARY OF SMITH/WYDEN/GRAHAM FARMWORKER GUESTWORKER LEGISLATION

Legislation has been passed in the Senate—as an amendment to the Commerce, Justice and State Departments' appropriations legislation—that would create a new agricultural guestworker program. The legislation is substantially different from the current H-2A program and would reduce employment opportunities, wages, and working conditions for U.S. workers. Below is a summary of the major provisions of the legislation and an analysis of the effects of these provisions.

TERMS AND CONDITIONS OF EMPLOYMENT

Wages

- Employer is obligated to pay the prevailing wage (or 105% of the prevailing wage under certain circumstances).
- The prevailing wage may be an hourly rate, a piece rate, a task rate, or a group rate.
- The employer is not required to pay by the prevailing method so long as employer method is "designed" to produce equivalent earnings.
- If the employer is paying by an incentive system, the employer is in compliance with the wage obligation if the average hourly rate for the entire group equals the required hourly wage.

Effect on Farmworker Wages

- Despite assurances to the contrary from Congressional staff, this provision appears to preempt any higher federal, state, or local minimum wage rate. The statutory language is very clear that the employer must pay **only** the required prevailing wage or the redefined adverse effect wage rate (up to 105% of the prevailing wage). Therefore, workers under this legislation may not benefit from the federal minimum wage (a recent prevailing wage survey in North Carolina found the prevailing wage to be $4.75 per hour, 40 cents below the federal minimum wage) or a higher state minimum wage.
- The redefinition of the adverse effect wage rate will lower farmworker wages. The current H-2A program requires the payment of the higher of the prevailing wage (the average wage in a crop in a limited geographic area), the federal, state or local minimum wage, or the **adverse effect wage rate** (the AEWR). The AEWR is intended to correct for the depressive effects of foreign workers (undocumented

workers and guestworkers) on wages in a local labor market. This wage depression is often reflected in the prevailing wage, where foreign workers can dominate a local labor market and thereby depress wages. The AEWR partially corrects for this depressive effect by measuring farmworker wages in a much larger segment of the labor market (currently state or regional labor markets) that will, at least in part, overcome the depressive wage effects in local labor markets.

- The incentive rate provision—a piece rate, task rate, group rate--means that individual employees may be paid less than the required minimum hourly rate so long as the aggregate hourly average for the entire group meets the minimum wage. For instance, if the required hourly wage was $5.00 per hour, the employer would be in compliance if the one-half of the group was paid $7.50 per hour and the other half of the group was paid $2.50 per hour.

Housing

- Employers who provide housing are permitted to charge for utilities and maintenance.

- A housing allowance is permitted if the employer does not provide or secure housing for workers. The housing allowance is calculated at the HUD Section 8 rate for the area, assuming two people per bedroom.

Effects on Farmworkers and Communities

- Allows growers to transfer some costs of housing they choose to provide to workers -- for maintenance, utilities and repairs -- even though these low-wage workers have no choice about their accommodations, thus lowering their actual earnings.

- Current law requires growers importing foreign farmworkers from hundreds and thousands of miles away to either provide or secure housing for them. The Smith/Wyden/Graham legislation allows growers to provide a payment -- voucher -- in lieu of housing unless the State determines and certifies that there is inadequate housing. The grower importing foreign farmworkers has no obligation to assure that housing is actually available that can be obtained with the voucher, so many workers may end up homeless, or be encouraged to overcrowd any available rental housing, and adversely impact the local community.

Transportation Reimbursement

- Workers may be reimbursed after 50% for incoming transportation costs and at the end of employment for return transportation. The statutory language indicates that the workers may request reimbursement from the employer but it is silent on the employers obligation to pay.

Effects on Farmworkers

- Unlike the current H-2A program, it is unclear that growers would have to reimburse workers for their transportation costs to and from the job. The cost of transportation to and from the job would be borne by low-wage workers traveling hundreds or thousands of miles for short-term, uncertain duration, employment.

The 50% Rule—Job Preference for U.S. Workers

- Only U.S. workers referred through the Registry are entitled to a 50% rule preference under which the employer must hire U.S. workers who apply for employment during the first one-half of the period of employment.

Effect on U.S. Workers

- Only U.S. workers registered and referred through the Registry may claim the benefit of the 50% rule preference. Workers who learn of the job through word of mouth (very common among farmworkers), a union hiring hall, or other means would not benefit from this provision, intended to give U.S. workers first preference for these jobs.

RECRUITMENT AND REFERRAL OF U.S. WORKER THROUGH THE REGISTRY

- DOL must create and maintain Registries of available farmworkers for referral to growers seeking foreign workers. Registries are limited to state or contiguous states and do not include traditional states from which migrant workers are recruited. Workers must request inclusion in a registry or registries.

Effects of the Registry:

Under current law, the responsibility for recruiting legal U.S. farmworkers when a grower is seeking to use foreign workers -- and thus give first employment preference to legal U.S. farmworkers -- is shared between the prospective employer and the U.S. Employment Service. These recruitment requirements are widely acknowledged to be largely ineffective (perhaps because employers seeking foreign workers do not want to hire U.S. workers), but the Smith/Wyden/Graham legislation will make them even less so:

- Growers seeking foreign workers would have no obligation to attempt to recruit legal U.S. farmworkers except through the Registry -- shifting all responsibility for domestic farmworker recruitment to a new, untried process for which the government and impoverished, low-skilled workers are entirely responsible.

- The Legislation would allow the new Registry only seven (7) days in which to try to locate and contact legal U.S. farmworkers to ascertain their availability and interest in accepting a grower's offer of employment and get these workers in touch with the prospective employer. Most U.S. farmworkers will be extremely difficult to locate and contact -- especially in such a short period of time -- due to the migratory and rural nature of their work.

- As a result, efforts to recruit legal U.S. farmworkers for these jobs will almost certainly be even less effective than at present and the use of foreign farmworkers -- single boys and young men -- will steadily increase.

- In effect, this proposed approach allows growers to concentrate all their worker recruitment efforts abroad, abandoning domestic worker recruitment to a new Federal bureaucracy.

- It appears that the Registry would only cover a State or contiguous States in a region. So, while growers are allowed to go abroad to recruit wherever they think workers are available, the Registry's search for available, legal U.S. workers would be confined to a region within the U.S., in many cases excluding farm labor supply areas.

THE EMPLOYER'S ASSURANCES

- The employer application does not need to contain a binding period of employment that is being offered to the prospective workers, U.S. or foreign. Further, an employer may withdraw an application, and is thereby relieved of its promises, so long as there is no alien worker currently employed.

- Employer is not required to employ referred workers who do not meet job-related criteria or continue to employ someone who fails to meet job related standards of conduct or performance, including minimum productivity standards, after a 3-day break-in period.

Effects on Farmworkers

- Eliminates current law's requirement that workers recruited be paid for at least three-quarters (75 percent) of the work contract period for which they were recruited. This will encourage growers to lure workers from hundreds and thousands of miles away with the promise of potentially high earnings without any obligation to fulfill any part of that promise. (This may also encourage growers to recruit more workers than they actually need to hedge against uncertainties.)

- Under current law, an employer may only impose an employment related qualification or productivity standard if it is found to be the standard practice by employers in the crop and the area. This protection is intended to prevent employers from imposing unreasonable qualifications and productivity standards that either discourage or disqualify U.S. workers from seeking employment. Under this legislation the Department of Labor has no authority to determine the validity of employer imposed qualifications, productivity standards, or other employment related standards. The effect could be the arbitrary refusal to hire U.S. workers or the arbitrary firing of any worker.

DOL REVIEW OF APPLICATION

- The Department of Labor has seven (7) days to determine that the employer has made all the required assurances in the application. The Department has no authority to inquire if the assurances are true. If the form is filled out completely, the Department must accept the application and search the Registry for workers for seven (7) days. At the end of the search the Department must either refer the requested workers or grant the employer's request for foreign workers. Failure to meet the deadline allows the employer to make the request directly to the Secretary of State.

Effect on the Department of Labor and Farmworkers

- The Department no longer has authority to determine that the employment of foreign workers will have a detrimental impact on U.S. workers.

- The Department has only seven (7) days to locate transitory, migrant farmworkers for the job or else U.S. workers are deemed to be unavailable for employment. At the end of the seven day period the employer must be granted permission to import foreign workers unless the search located and referred sufficient U.S. workers.

DRAFT

Existing H-2A Farm Worker Program

I. Substantive Worker Protections:

The specific information, protections, and assurances that must be given to both U.S. and foreign workers hired under the H-2A program are as follows:

1. Rate of pay is the highest of federal/state minimum wage, prevailing wage or adverse effect wage rate.

(Statutory)

2. Workers are entitled to disclosure of the all material terms and conditions of employment, including the following:

(regulatory)

(a) Any minimum "productivity" standard;
(
b) Employer must guarantee that at least three-fourths of the employment offered will be provided;
(c) List any qualifications necessary for the job.

H.R. 2377 Farm Worker Program

I. Substantive Worker Protections:

The attestations grant workers limited workplace rights. The employer simply attests that the offer will provide the following:

1. Employers pay the prevailing wage based on either the State Employment Security Agency (SESA) or employer developed wage data based on criteria to be developed by Secretary of Labor: no adverse effect wage rate (AEWR). Presently, the AEWR is usually the highest rate and as such controls most H-2A contracts.

2. Workers entitled to a limited Migrant and Seasonal Agricultural Worker Protection Act (MSPA) disclosure of the terms and conditions of employment only at the point the visa is issued, not a the time of recruitment with the following exceptions:

(a) not required to disclose productivity standards.

(b) no ¾ guarantee

(c) no similar protection

Wyden/Graham Proposal

I. Substantive Worker Protections:

The employer must provide certain "assurances" in its application about the terms and conditions under which workers will be employed.

1. The employer must offer to pay (and is not required to pay more) the higher of the prevailing wage or the adverse effect wage rate (AEWR). The AEWR, as determined by the USDA average wage for field and livestock workers, is redefined so that it can never be higher than 105% of the prevailing wage but may be less. The obligation to pay a higher state or federal minimum wage is not in the legislation.

2. Workers are entitled to Migrant and Seasonal Agricultural Worker Protection Act (MSPA) disclosure of the terms and conditions of employment only at the point the visa is issued, not at the time of recruitment.

(a) no minimum productivity standard need be disclosed
(b) no ¾ guarantee

(c) occupational qualifications must be in the application.

Existing H-2A Farm Worker Program	H.R. 2377 Farm Worker Program	Wyden/Graham Proposal
3. Employer temporary labor camp housing must be provided by the employer at no charge to migrant workers and must meet all federal, state and local health and safety standards. The employer may secure rental and/or public accommodations that meet local or state standards. If there are no local or state standards, the housing must meet Federal temporary labor camp standards. The housing must be provided at no charge to the worker. (Statutory)	3. Housing that meets the lesser of federal, state or local standards or voucher must be provided to migrant workers only if it is a prevailing practice. Employer may charge the workers for the housing. Employers housing providing by voucher exempt from housing standards under MSPA.	3. Housing or a voucher must be provided by the employer. Employer provided temporary labor camp housing must meet federal standards. Employer provided rental or public accommodations must be local standards, or, in the absence of local standards, State standards. The Federal standards do not apply even if there are no local or state standards. The employer may charge the worker for utilities, maintenance, and require the posting of a security deposit The employer may provide a housing voucher in lieu of housing. The voucher must be the equivalent of the HUD Section 8 fair market rental rated based on the assumption of two persons per bedroom. Three (3) years after enactment of this legislation (but not sooner); a governor may certify that there is not sufficient housing in the area of intended employment. The employer must then provide housing.
4. Transportation cost to the work site reimbursed after 50% of contract period: return transportation costs provided at end of contract. (Regulatory)	4. No similar protection.	4. Workers may apply to the employer for transportation reimbursement for incoming transportation after completion of 50% of the period of employment of the job opportunity for which the workers was hired and for return transportation at completion of the period of employment.
5. Assurance that workers' compensation is provided. (Statutory)	5. Similar protection.	5. Workers compensation or its equivalent must be provided.

Existing H-2A Farm Worker Program	H.R. 2377 Farm Worker Program	Wyden/Graham Proposal
6. Employers may not discriminate against domestic workers in hiring, terms and conditions of employment, or termination in favor of foreign workers. U.S. workers given an affirmative preference. (Statutory)	6. Attestation that U.S. workers will not be adversely affected and qualified U.S. workers will be given preference in hiring.	6. Employer must assure that qualified U.S. workers will be hired if they are referred through the registry.
7. May not use H-2A workers to replace workers involved in a labor dispute. (Statutory)	7. Attest that there is no strike or lock out in the occupation at the place of employment.	7. "Assurance" that the job opportunity is not vacant because a worker is involved in a strike, lockout, or work stoppage in the course of a labor dispute.
8. Employer must observe all prevailing practice or benefits in the area, such as providing family housing, productivity standards, employer provided tools, etc. (Regulatory)	8. No similar protection.	8. No similar protection.
9. No MSPA transportation safety protection.	9. MSPA transportation safety protection provided.	9. MSPA transportation safety protections provided.

Existing H-2A Farm Worker Program

II. Recruitment and Hiring of U.S. Workers

1. Employer develop and implement an affirmative domestic worker recruitment plan.

(Statutory)

2. Qualified domestic workers must be given jobs within the first 50% of the contract period even if foreign workers are displaced.

(Was Statutory, now regulatory)

3. Job offer must be placed in the employment service interstate clearance system and distributed to areas of known labor supply.

(Statutory)

H.R. 2377 Farm Worker Program

II. Recruitment and Hiring of U.S. Workers

1. No similar protection.

2. Qualified U.S. workers given preference for first 25 days after job order filed or 5 days before date of need, which ever occurs later. U.S. workers can be rejected for employment as early as 5 days before work begins.

3. No similar protection. Local SESA office posting only. Nonemployer specific information about potential labor need may be disseminated but no intra- or interstate clearance system job order need be filed.

Wyden/Graham Proposal

II. Recruitment and Hiring of U.S. Workers

1. No positive recruitment obligation. The employer must "assure" that workers satisfactorily employed the previous year in the occupation and at the location have been sent a letter informing them of the job opportunity.

2. U.S. workers must be employed during the first 50% of the "anticipated period of employment shown in the employer's application" but only if referred by the registry.

3. No posting on the Interstate Clearance System required. A new system—the Registry—is created and is intended as the worker recruitment and referral system. The creation, maintenance, and operation of the Registry is the obligation of DOL.

The Registry—actually multiple registries encompassing either a single or a group of contiguous states—are intended to be the sole means by which the Secretary determines if there are U.S. workers are available for the jobs. The registry refers available workers to employers seeking foreign workers. The entire recruitment and referral period is 7 days long.

The Registry provisions appear to leave the hiring decision to the Department. According to Section 5(a) the Secretary determines if the worker is ready, willing and able to accept the job opportunity and will commit to work at the time and place needed. If so, the worker is provided employer information, the location where to report, and a statement of the terms

Existing H-2A Farm Worker Program	H.R. 2377 Farm Worker Program	Wyden/Graham Proposal
		and conditions of employment. The employer is provided the names, addresses and social security numbers of the workers referred and information on how to contact the workers. The employer's request for foreign workers is then reduced by the number of referred workers.
4. User fee collected to partially defray administration of the program. (Statutory)	4. User fee collected to help defray administration of program.	4. The cost of administering the program are paid by the DOL Wagner-Peyser Act funds and general appropriation. No user fees charged employer.
III. Enforcement of Labor and Immigration Laws	III. Enforcement of Labor and Immigration Laws	III. Enforcement of Labor and Immigration Laws
1. DOL may enforce compliance with labor laws by H-2A employers like any other employer. (Statutory)	1. DOL may investigate only upon complaints by aggrieved person or organization, including bargaining representatives.	1. DOL may investigate only upon complaints by aggrieved person or organization, including bargaining representatives or at its discretion. Complaint investigations limited to allegations of violations within the last 12 months.
2. DOL may sue in court for violation of the terms and conditions of employment on behalf of workers. (Statutory)	2. No similar protection. May seek to collect back wages, civil money penalties or enforce debarment only.	2. No similar protection. May seek to collect back wages, civil money penalties or enforce debarment only.

Existing H-2A Farm Worker Program	H.R. 2377 Farm Worker Program	Wyden/Graham Proposal
3. Violations may result in civil money penalties, full Fair Labor Standards Act back wage remedies, actual monetary damages or debarment. (Statutory)	3. Limited civil money penalties and back wage collection; debarment for one year only.	3. Limited civil money penalties and back wage collection; for wage violations, debarment for one year for first violation, three years for second violation, and permanent debarment for third violation. Civil money penalties up to $1000 may be assessed for misrepresentation of a material fact on the application or failure to meet a condition specified in Section 4, the "assurances." One year debarment for nonwage "substantial" violations.
4. H-2A employers must post a bond to assure the return of the H-2A workers at the conclusion of the contract or became employed by another certified employer.	4. Employer under no obligation to insure the worker leaves the U.S. upon completion of work. 25% of workers' wages withheld and returned only upon timely repatriation of the worker.	4. Employer under no obligation to insure the worker leaves the U.S. upon completion of work.
5. H-2A workers must leave the U.S. within 10 days of completion of the H-2A employment.	5. Worker under no obligation to leave U.S. until 14 days after end of employment.	5. Worker under no obligation to leave U.S. until 14 days after end of employment.
6. No limitations on number of H-2A workers but there must be an independent DOL determination of shortage after attempts to recruit U.S. workers. (Statutory)	6. 25,000 limitation on number of workers admitted and no independent DOL determination of shortage. USDA will allocate the worker to 5 regions to be determined. Effectively shifts control over immigration admissions from the government to the agricultural industry.	6. No limitation on the number of workers admitted under this program.
7. Workers excluded from MSPA. (Statutory in MSPA)	7. Workers partially covered by MSPA. Limited disclosure and housing rights.	7. Workers partially covered by MSPA. Limited disclosure and housing rights.

Existing H-2A Farm Worker Program	H.R. 2377 Farm Worker Program	Wyden/Graham Proposal
IV. Procedural Safeguards	IV. Procedural Safeguards	IV. Procedural Safeguards
1. Application normally must be filed with local SESA and DOL regional office at least 60 days before beginning of work so domestic farm workers can be recruited. (Can not require filing more than 60 days before date of need, can shorten time by regulation.)	1. Applications filed with local state employment service agency (SESA): no timeliness requirement.	1. Application must be filed with the Department of Labor not later than 21 days before date of need. An employer may withdraw the application so long as there are no foreign workers employed by the applicant. The withdrawal relieves the applicant of any obligations owed to foreign workers undertaken in the application. U.S. workers who have rights under other law or regulation governing recruitment may still have some rights.
2. DOL must approve or notify applicant of any legal objections to the application within 7 days. (Statutory)	2. DOL has no authority to review: SESA reviews only for "completeness and accuracy" within 7 days. May reject only for "incompleteness" or "obvious inaccuracy."	2. DOL reviews to ensure the "assurances" under Sec. 4(a) have been made. If complete, the application is approved within 7 days. If not the Department shall reject within 7 days. The applicant must be provided an opportunity to resubmit an amended application or, at the applicants option, an expedited review or de novo administrative hearing before an ALJ. The applicant may submit an application to the Attorney General for issuance of visas if the Secretary fails to refer sufficient workers from the registry or fails to submit the report of insufficient workers.
3. Emergency petitions for unforeseen need may be filed at any time and will be processed within one to two weeks. (Regulatory)	3. No comparable provision because not necessary.	3 Employers may seek a expedited approval if they did not use the program the prior year; who face an "unforeseen" need for workers; and whom the Secretary can not refer workers from the registry.

Existing H-2A Farm Worker Program

4. Application may be rejected by DOL if it does not adequately protect U.S. workers from adverse effects by the foreign workers.

(Statutory)

H.R. 2377 Farm Worker Program

4. DOL has no authority to determine whether or not the offer would adversely affect U.S. workers.

Wyden/Graham Proposal

4. DOL has no authority to determine whether or not the offer would adversely affect U.S. workers.

Miscellaneous provisions:

1. Workers who complete at least 6 months of work under the program for 4 consecutive years are given permanent immigration preference under 203(b)(1)(3).

2. The program appears to be in addition to, and not in lieu of, the current H-2A program for five years, after which the current H-2A program is eliminated.

mlsp

Dems. who voted against us (for Wyden amendment)

Moynihan
Biden
Breaux
B. Kerry
Bryan (Nev.)
Robb

Bumpers
Baucus
Bingaman
H. Reid
Hollings
Cleland

For us? (surprises)

Murray
Ford
Lieberman
Landrieu

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

JUL 22 1998

The Honorable Ron Wyden
United State Senate
Washington, D.C. 20510-3703

Dear Senator Wyden:

This letter presents the Administration's views on your proposed amendment to the Commerce, Justice, State, and Judiciary appropriations bill, S. 2260. While the Administration shares your goal of assuring that our agricultural labor policy and any reform of the H-2A program both provides growers with a predictable and reliable labor supply, and assures adequate workplace protections for domestic and foreign farm workers who are among the poorest and most vulnerable in our society, the Administration strongly opposes your amendment.

The President opposes legislation that would create a new guest worker program. This position is consistent with the findings and recommendation of two bi-partisan commissions -- the Commission on Agricultural Workers and the Commission on Immigration Reform. However, he has directed that if efforts to halt illegal immigration contribute to agricultural labor shortages, the Departments of Agriculture and Labor should work cooperatively to improve and enhance existing programs to meet the labor requirements of our vital agricultural industry, consistent with our obligations to American workers. While the General Accounting Office has recently reported (December 1997) that "ample supplies of farm labor appear to be available in most areas" there is some possibility of localized shortages relating to specific crops or geographic areas.

The Administration's guiding principles in reforming the H-2A program are attached. We are currently engaged in a process of reform consistent with these principles, and we invite a constructive partnership.

In response to concerns regarding localized shortages, the Departments of Agriculture and Labor have been working cooperatively under the aegis of the Domestic Policy Council and the National Economic Council to develop administrative and regulatory reforms to the current H-2A program to make it more responsive to agricultural producers and more effective in protecting U.S. workers.

As a first step, the Administration has initiated a rulemaking process to streamline the H-2A program that is to be completed by the end of January 1999, for next year's growing season. In response to the growing concerns regarding the supply, adequacy and cost of migrant worker housing, we are looking Administration-wide at alternatives and resources available to address the issue.

We want to continue to explore policy proposals which increase our ability to achieve our above stated goals. We would like to work with you in this ongoing process. However, we do not believe that your proposed amendment, which makes changes to the agricultural farm worker program that weaken the labor protections for migrant farm workers, accomplishes these goals.

The Office of Management and Budget advises that there is no objection to presentation of this report from the standpoint of the Administration's program.

Sincerely,

Alexis M. Herman

Alexis M. Herman

STATEMENT OF PRINCIPLES
H2-A REFORM

The Administration's guiding principles for reform of the H2-A program are intended to assure that these policies achieve greater stability in the agricultural workforce so that our agricultural producers and farm workers both benefit. Growers must have a more predictable and reliable labor supply, while we provide adequate workplace protections for domestic and foreign farm workers who are among the poorest and most vulnerable in our society.

The Administration's guiding principles in reforming the H-2A program are designed to create a system:

- where the procedures for using the program are simple and the least burdensome for growers;
- which assures an adequate labor supply for growers in a predictable and timely manner;
- that provides a clear and meaningful first preference for U.S. farm workers and a means for mitigating against the development of a structural dependency on foreign workers in an area or crop;
- which avoids the transfer of costs and risks from businesses to low wage workers;
- that encourages longer periods of employment for legal U.S. workers;
- which assures decent wages and working conditions for domestic and foreign farm workers, and that normal market forces work to improve wages, benefits, and working conditions.

COMPARISON OF ORIGINAL WYDEN PROPOSAL VS. THE SMITH BILL VS. THE BIPARTISAN AGREEMENT

1. REPEAL OF THE CURRENT SEARCH REQUIREMENTS FOR H2A APPLICANTS:

Wyden proposal:
Under current law H2A applicants must search for U.S. resident farm workers. Both worker and grower advocates believe that the regulation of this process is highly subjective and ineffective. This search process is repealed and replaced with a 21 day search process using a registry of agricultural workers.

Smith Bill: 7 Day process involving "Labor Condition Attestation", in which the grower attests that certain benefits will be provided to foreign workers; uses the current DoL system of job clearances to determine if there are U.S. workers willing to take the jobs.

Bipartisan bill: 21 day search process through the Registry.

2. ESTABLISHMENT OF AN AGRICULTURAL WORKER REGISTRY:

Wyden: A worker registry would be established to create an effective and efficient system enabling agricultural producers to secure qualified U.S. labor. The purpose of the registry is to create a highly functional resource for matching U.S. farm workers with work opportunities.

The Secretary of Labor would oversee this worker registry, which would be organized according to logical labor market regions. Any legal U.S. resident could at any time either add or delete their name from the registry. Workers listed on the registry will have the first choice to fill a job for which foreign workers are sought. The registry will be designed to be a highly functional resource for matching farm workers with work opportunities.

Administration of the registry would be financed by user fee payments from H-2A program participants.

Smith Bill: No provision

Bipartisan bill: Creation of the Registry, as described above.

3. ASSURANCE OF A LEGAL LABOR SUPPLY

The employer is assured that workers provided through the registry are legally entitled to work in the United States.

Smith Bill: No provision

Bipartisan bill: Legal status validated by the Registry, as described.

4. APPLICATION PROCESS TO SECURE FARM WORKERS

Wyden: For a grower who is experiencing a shortage of workers, an application for workers may be made to the Department of Labor. The application would be subject to a 21 day process, as follows:

- The application is referred to the registry for recruitment of legal U.S. workers.
- U.S. workers are given a preference to fill the jobs requested in the application, and would be notified first of the work opportunity.
- After interested U.S. workers have indicated their intent to take jobs with the applicant, H-2A Visas would be made available for the remaining number of workers sought by the grower.
- If the Department of Labor fails to act within the time lines under the bill, the opportunity is provided for direct application to the State Department for the issuance of H-2A visas.

Smith Bill: Upon acceptance of application (7 days for review by Dept. Of Labor), INS has 3 days in which to issue H-2A visas

Bipartisan bill: 21 day registry search as described above.

5. APPLICATION OF THE MIGRANT AND SEASONAL WORKER PROTECTION ACT.

Wyden: The proposal would eliminate the current exemption from MSPA for H-2A workers, as it applies to the protection of workers in the United States. ?

Smith Bill: Same

Bipartisan bill: same

6. ELIMINATION OF THE AGRICULTURAL WORKER EXEMPTION UNDER THE FEDERAL UNEMPLOYMENT TAX ACT.

Wyden: The proposal brings farm workers under the full benefits of the federally assured system of unemployment insurance. Farm workers would be treated like workers in virtually all other occupations. Washington and California currently require equal treatment of farm workers, and Oregon Gov. Kitzhaber has proposed eliminating the exemption for each of the past three years. ?

Smith Bill: No provision

Bipartisan bill: All H-2A program participants must provide Unemployment Insurance coverage.

7. TRANSPORTATION PILOT PROGRAM

The proposal directs the Secretary of Labor to conduct a pilot program involving the issuance of vouchers to farm workers for the purpose of traveling to job referrals made through the registry.

A pilot program is necessary to resolve concerns that transportation benefits have been tried in the past but resulted in workers cashing in the benefit or using the transportation for some other purpose.

Smith Bill: only required if assistance is also provided to foreign workers.

Bipartisan bill: Transportation pilot program, plus payment of transportation as currently required except that payments will come through the Dept. Of Labor out of the account built by the user fees.

8. CREDIT TOWARD LEGAL RESIDENCY

Wyden: Section 203(b)(3) of the Immigration and Nationality Act establishes priorities for legal immigration to the United States. Currently, farm workers, not including temporary or seasonal workers, are classified as "other workers," for the purposes of immigration. The bill would create a new authority for the issuance of a certain number of immigration visas to "qualified immigrants who have completed 4 years of work in the U.S. under an H-2A visa."

keep

The proposal would allow an illegal alien to return to their home country and be allowed to reenter the United States legally under an H-2A visa.

Smith Bill: no provision

Bipartisan bill: Includes the provision as described above.

9. IMPROVE FARM WORKER FAMILY ACCESS TO HEAD START

Wyden: The proposal removes some of the administrative barriers identified by farm worker advocates to participation of farm worker families in the Head Start program.

Smith Bill: no provision

Bipartisan bill: Includes the provision as described.

10. ASSIST WORKERS IN LINKING SUCCESSIVE JOBS INVOLVING DIFFERENT HARVEST SEASONS.

Wyden: The proposal requires that the registry be designed for the additional purpose of assisting workers to increase the length of their work season by identifying opportunities to work on other crops with complementary harvest seasons.

Smith Bill: no provision

Bipartisan bill: Includes the provision, as described.

Department of Labor H-2A Issues
July 17, 1998

1. Federal or State Minimum wage

DoL concern: That the bill could allow a prevailing wage determination that is less than the applicable minimum wage requirement.

Discussion/Response: P. 12, line 21 requires compliance with "all applicable Federal, State, and local labor laws..." Our policy is that minimum wage standards apply.

2. Migrant and Seasonal Worker Protection Act (MSPA) Disclosure to foreign workers

DoL concern: Is that the draft does not require full disclosure of the terms and conditions of the contract to foreign workers, as it does to U.S. workers, and that MSPA disclosure should occur earlier than once the visa is issued. H-2A workers shouldn't have to wait until they have their visa to hear about MSPA.

Discussion: Recruiters in foreign countries are often looking for interested workers for a number of farmers. The employer is not determined until the worker requests a visa, so that is the first point where the specific terms of employment could be disclosed.

Resolution: Modify the bill to require informing the foreign worker of MSPA rights prior to issuance of visa, but after specific employer has been determined. This could be done prior to actual visa issuance, but would usually be at the embassy. Importantly, we take major steps to cover H-2A workers by MSPA. This has never been done before. Our clarification of MSPA coverage ensures that every worker receives information about terms and conditions of employment before the visa is issued. This disclosure can happen at the consulate, which is where, realistically it is known which specific job the alien is going to. A recruiter in the field may be recruiting for 10 or more growers; were we not to clarify this, he/she would have to hand out documentation on each and every different job possibility. Workers are protected because they know terms and conditions before they come to the US, and the process is streamlined because we recognize the reality of ag recruitment.

3. Rejected applications from debarred applicants

Employer Assurances:	Sec. 4(e)(2) APPROVAL OF APPLICATIONS.-If the Secretary determines that an application meets the requirements of subsection (a) and is not ineligible to apply under section 8(b)(4), the Secretary shall...approve the application...

DOL concern: Section 8(b)(4) refers to program disqualifications which result in three year and permanent disbarment. Applicants who are currently disbarred should be disqualified from applying, regardless of the length of time of the disbarment.

Discussion/Resolution: Sec. 4(e)(2) should be amended to allow the Secretary to refuse any application from an employer who is currently disbarred.

4. Identified housing should meet federal standards

Housing: Sec. 7(b)(2) (pg26) ...an employer may, at the employer's election, provide housing that meets applicable federal standards for temporary labor camps or secure housing that meets applicable local standards for rental or public accommodation housing or other substantially similar class of habitation, or in the absence of applicable local standards, State standards for rental or public accommodation housing or other substantially similar class of habitation.

DOL concern: Federal standards should be applicable for employer provided housing. Secured housing needs to meet local or State standards. In many rural areas, there may be no State or local housing standards. In these cases, federal standards should apply.

Discussion: This section indicates that where no local standards apply, State standards for rental or public housing accommodation or other substantially similar class of habitation would apply. Thus, there would be State standards which could apply to all areas.

Response: DOL should identify examples of where State standards would not be applicable or clarify why federal standards would be necessary.

5. Housing: assurance that housing is, in fact available

The bill allows the payment of an allowance (at 1/4 the average of HUD-identified fair market rents of a state's rural counties)

DoL concern: That prior arrangements should be made to assure that when workers arrive they actually have housing opportunities, that housing is actually available.

Response: First, it is clearly in the grower's primary interest to see to it that workers situate themselves in an area from which they can be retrieved for work. Second, securing rental housing "Up front' invites NIMBY-ism, likely creating a political problem for the grower within the community, as the grower attempts to secure what is expressly farm worker housing from the rental market.

The bill provides authority for a state, through the governor, to determine that for any locality there is an insufficient supply of farm worker housing; such a finding eliminates the "allowance option" and compels all H-2A program participants to directly provide housing.

The bill creates a significant incentive for growers to build farm worker housing, by increasing a grower's certainty about finding a legal labor supply, by providing a 40% break on user fees for growers with on site housing, and by allowing the recovery of property damages from workers.

6. Housing: allowance of charges for utilities, maintenance, security deposit, and damages (draft, p. 27)

For a grower that provides housing to farm workers, the bill allows the payment of charges as follows:
-fair market value (but not more than the employer's actual cost) for maintenance and utilities;
-security deposit to protect against gross negligence or willful destruction of property
-may require a worker found to have been responsible for damage..not normal wear and tear..to reimburse the employer for the reasonable cost of repair.

DoL concern: Is that these provisions are burdensome to farm workers

Discussion: Clearly, the goal of this legislation is to increase the stock and provision of housing for seasonal farm workers, free of charge. It does this by providing a variety of incentives (reduced user fees, savings on housing allowances, financial assistance for construction of seasonal housing) for growers to construct housing. An important incentive to any housing provider is the ability to protect against property damage.

We require that the deposit is a REASONABLE fair amount, which the worker receives back in full, provided no damage has occurred. Although it may seem "hostile" to workers, it may help workers in two ways: 1) By allowing the grower to secure a small deposit, he/she will be more assured that housing that he/she builds will remain viable for many more years. Not having a reasonable, fair deposit would DISCOURAGE the construction of farm worker housing. 2) It protects the farm workers from damages caused by one destructive individual. In areas where you have numbers of people living in close proximity, why should a dozen farm workers suffer from one person's actions. Items damaged are re-built and the housing is maintained in a way that benefits everyone.

Response: Amend the draft to cap the security deposit at $50.00 per worker.

7. Wage withholding

Page 50-51 of the bill requires the withholding of 20% of the foreign worker's wages, to be deposited in an interest bearing trust and paid to the worker upon return to the home country.

DoL concern: That this provision is hostile to workers, that we have no parallel circumstance in which we withhold wages in order to incent future behavior.

Discussion: This provision is of little interest to growers. However, the viability of this legislation is directly related to the assurance to border states that H-2A foreign workers will, in fact, return to the home country upon completion of the H-2A contract. In addition, with the payment of, at minimum, a worker's transportation and housing costs, plus the implicit motivation of foreign workers to come here, save as much as they can, and return home, the provision seems unlikely to affect the ability of a worker to afford basic living expenses.

Response: Revise the draft to require monitoring of the return rate of H-2A foreign workers, and provide discretionary authority to the Attorney General, if it is found there is an insufficient return rate, to institute a wage withholding system.

8. Transportation

The bill requires the payment, by the DoL, out of the user fee account, payment of transportation for inbound (after 50% of work period) and outbound (at season end) travel to the work location, if greater than 100 miles. The bill requires a pilot program for providing transportation advances to workers.

DoL concern: That requiring a worker to seek reimbursement from the Department is bureaucratic both for the Department and the grower. The grower should pay this cost directly.

Discussion/Response:

Our goal was to establish a transportation benefit to workers that would be paid for by the growers. The bill does this. Under conservative estimates of user fee receipts, this provision should be fully funded; so, too, will the Dept. Of Labor's costs to administer the program.

9. Who may complain--Enforcement and Penalties

Enforcement: Sec. 8(a)(1) (pg 37, line 12) Complaints may be filed by any aggrieved person or organizations (including bargaining representatives).

DOL Concern: Foreign workers are vulnerable; they are afraid to file complaints. Any interested party should be able to request that DOL investigate an employer, and DOL should be able to instigate an investigation at any time.

Discussion: Anonymous complaints are investigated now. That is not changing. Workers would not be required to identify themselves.

Resolution: Add language, if necessary, to clarify that other interested parties my file complaints and that the Department of Labor may investigate any employer at their discretion. Our policy is to retain any existing authority under which the Department of Labor investigates wage, working conditions, or other violations.

10. Statute of limitations on complaints

Enforcement: Sec. 8(a)(1) (pg 37) No investigation or hearing shall be conducted on a complaint concerning such a failure or misrepresentation unless the complaint was filed not later than 12 months after the date of the failure or misrepresentation, as the case may be.

DOL concern: The statute of limitations on complaints, as with Fair Labor Standards Act, should allow for two years (three years for repeat offenders) not just one year.

Discussion: This section only applies to issues other than those covered under FLSA, MSPA or other statutes.

Resolution: Our policy is not to affect any current statute of limitations requirement of either FLSA or MSPA. We are asking Legislative Counsel to confirm that this is the case, and to add clarifying language if necessary.

11. Penalties for "other" material violations

Enforcement: Sec. 8(a)(4)(A-B) (pg 39-40) PROGRAM DISQUALIFICATION (3 YEARS FOR SECOND VIOLATION and PERMANENT FOR THIRD VIOLATION) -Upon a (second final) (third final) determination that an employer has failed to pay the wages required under this Act, the Secretary shall report such determination to the Attorney General and the Attorney General shall disqualify the employer from the employment of aliens ... for a period of 3 years) (from any subsequent employment.)

DOL concern: Penalties of 3 year and permanent disbarment should apply to other violations, ie, filing an application that misrepresents a material fact or failing to meet a condition specified in Section 4.

Resolution: Add language to the draft that allows debarment from program participation for both wage and any other substantial violations of program requirements.

12. Three quarters guarantee:

The 3/4 guarantee was adopted via regulation and is not specifically directed by any statute. Under the 3/4 guarantee, a grower must guarantee any H-2A worker, and any US worker referred to an H-2A grower, the pay that the worker would have made in 3/4 of the expected work season.

DoL concern: The 3/4 guarantee is necessary to assure workers of a certain amount of work, to prevent growers from requesting an overage of workers with the intent of later "culling" the undesirables, and to prevent a worker from traveling a long way only to find the work season shut down because of market conditions or other, non-disaster related reasons.

Discussion:
This is precisely one of the problems with the current program that needs to be corrected. Agricultural production is, by nature, a chancy and unpredictable thing. Even predicting how many workers will be needed and how long they will be needed is subject to great uncertainty. Many circumstances can arise where harvesting or some other activity will be cut short. When the bottom falls out of the price for a crop, if the grower can cover its harvesting cost and at least some of the production costs, which have already been incurred, the grower will continue to harvest. If the price falls to the point where even the harvesting cost cannot be covered, the grower will attempt to minimize his losses by stopping harvesting. We know of no other circumstance in the U.S. economy in which an employer who is losing money is compelled to continue operating. To require this as a condition for qualifying for foreign workers is unreasonable.

We think the current bill deals with this problem in a reasonable way. With the registry in place, if a worker's season is unexpectedly reduced, the worker can go back to the registry for another job. This worker picks up the phone, informs the Registry he/she is looking for work, and is referred to the next job that comes along. He/she can also bump H-2A workers who have not yet completed their 50% of the work period. Though the registry, we want to not only make sure that a worker has a chance to complete at least 3/4 of a job -- but string together an entire YEAR of jobs, even if climate conditions make that difficult.

With regard to the concern about overshooting the request for workers, and then culling, workers who are wrongfully terminated (including aliens under our bill) are subject to the protection of applicable federal, state and local laws.

Response: Addition of the following language, p. 12, line 16, to read: "The employer shall assure that the employer will refuse to employ or terminate eligible individuals referred pursuant to this act only for lawful job related reasons, including lack of work."

13. Protection against arbitrary dismissal of workers

DoL concern: Is that the registry, and the bill, does not provide job opportunities to non-skilled persons, and would allow the setting of arbitrary standards enabling growers to dismiss unwanted workers without legal cause.

Discussion:

Employers are subject to all federal, state and local labor laws. Workers (both domestic and alien) have the same protections against wrongful termination as every other worker.

The bill assures that an employer has no incentive to unlawfully terminate a domestic worker. Sec. 6(c)(1)(A) authorizes the replacement of a terminated worker with an H-2A worker only if the worker is terminated "for a lawful job-related reason". The Labor Department decides whether this condition has been met. If, in DOL's view, the worker was improperly terminated, no authority to import a replacement H-2A worker will be granted. This, by the way, is the same way replacement of terminated domestic workers works in the current H-2A program.

Non-skilled workers (welfare or otherwise) are eligible to be listed on the registry, and the bill requires their referral to jobs for which they are qualified, i.e. jobs for unskilled workers, on the same basis as DOL refers any other registry worker. Sec. 4(e) provides that DOL may reject any employer's application for workers which fails to comply with the requirements of the Act. Sec.4(a) provides that qualifications must be bona fide occupational qualifications. DOL is the arbiter of whether any particular qualification is a bona fide occupational qualification. If, in DOL's view, an employer's application contains qualifications which are not lawful, it will be rejected. This is exactly how this issue is handled currently.

qualifications and experience

In the draft bill the DOL is the arbiter of what constitutes appropriate qualifications, including experience requirements. If it deems a particular qualification not to be a bona fide occupational qualification, the application is rejected and the employer cannot participate in the program.

Some DOL personnel and farm worker advocates argue that employers seeking foreign workers should not be permitted to impose any qualifications, including an experience requirement, on any job for which the employer is seeking foreign workers. This is one of the reasons this issue is addressed in the draft bill. Growers totally reject the notion that to qualify for foreign workers they must first accept and employ workers who do not possess the bona fide occupational qualifications for the jobs.

Response: Addition of language specified in issue #12, above.

14. Prevent the abuse of probationary period.

The bill provides for a redetermination of the need for workers if the worker is not ready, willing, able, or qualified to perform the work required, or if the worker is terminated for a lawful job-related reason, or if the worker quits or doesn't show.

DoL concern: Is that the provision could be abused

Discussion:

As discussed above, it is the Labor Department which is the arbiter of whether an employment criterion such as an employment standard is lawful and job-related. If it isn't, DOL will reject the employer's application to the registry, which is what they do now.

Response: Addition of language specified in #12, above.

15. Entitlement of H-2A workers to Legal Services Corporation representation:

DoL concern: That the provision on page 56 line 1, which establishes that H-2A foreign workers are not eligible for any means tested public benefit program, revokes eligibility for Legal Services assistance.

Response: This is not our policy; we have asked Legislative Counsel to determine if this is a problem and if so to add language clarifying that H-2A workers may obtain Legal Services assistance.

16. 50% rule:

DoL Concern: That the bill renders the so called "50% rule" ineffective.

Discussion: The 50% rule allows a U.S. worker to "bump" a foreign H-2A worker during the first 50% of the H-2A contract period. Under the bill, a worker seeking work through the registry may only exercise this 'bumping' right if there are no other requests for workers through the registry from elsewhere in the state.

Response: Revise the language to allow bumping rights for a U.S. worker through the registry to any job in the area, instead of any job in the state. In other words, if there is no other registry search underway within the local area (instead of anywhere in the state), the worker gets bumping rights.